No. 14-849

IN THE

Supreme Court of the United States

AMERICAN CYANAMID CO., ET AL.,

Petitioners,

v.

ERNEST GIBSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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The Wisconsin "risk contribution" rule the Seventh Circuit approved in this case is of unprecedented retroactive scope, imposing liability for conduct as far back as 1919 under a theory announced in 2005. The Seventh Circuit's decision widened two Circuit splits, one concerning the proper standard to apply in evaluating the constitutionality of retroactive economic liability, and the other concerning the role of dissenting opinions in the *Marks* analysis. Petitioners potentially face hundreds of millions of dollars in unanticipated liability based on cases currently pending. And by asking this Court to deny certiorari, Respondent seeks to clear the way for tens of thousands of additional plaintiffs to sue through 2029. All this is undisputed.

Remarkably, Respondent offers no defense on the merits of the Seventh Circuit's conclusion that *Eastern Enterprises* established no controlling precedent. Respondent instead contends that it is irrelevant whether *Eastern Enterprises* applies, because the Seventh Circuit conducted a due process analysis using ordinary rational basis review. But the Seventh Circuit didn't think that the applicability of *Eastern Enterprises* was irrelevant. Instead, the court spent 15 pages analyzing whether *Eastern Enterprises* supplied a controlling test, and concluded that, because it did not, "we are back to where we started": ordinary rational basis review. Pet. 37a.

Respondent seeks to downplay the importance of the decision as applying to only one "narrow" law in a "single state." Opp. 2. But the Seventh Circuit's decision has huge ramifications for former manufacturers of lead pigments located across the nation who will face liability under Wisconsin's law; for any individual

or business that may face retroactive economic liability of any sort; and for businesses defending themselves against novel tort theories under which plaintiffs seek to avoid the burden of causation and defendants are presumptively guilty. Certiorari is warranted to resolve two Circuit splits and to correct the Seventh Circuit's deeply flawed approach to the individual causation requirement that is a bedrock of our justice system.

I. The Seventh Circuit's Refusal to Apply *Eastern Enterprises* Conflicts With This Court's Precedents and Widens Two Circuit Splits

Nine justices in *Eastern Enterprises* concluded that imposing severe, disproportionate, retroactive liability for decades-old conduct can violate the Constitution. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998). Five justices—Justice Kennedy in concurrence and four justices in dissent—agreed that the Due Process Clause protects companies from such liability. Respondent does not dispute that, under multiple decisions of this Court, when five Justices agree on a rule of law, that rule is binding even if the agreement appears in a dissent and a concurrence. Pet. 16 (citing cases). Respondent does not defend the Seventh Circuit's contrary holding that "dissenting opinions cannot be counted." App. 35a. In fact, Respondent does not offer *any* merits-based defense of the Seventh Circuit's determination that *Eastern Enterprises* supplies no controlling rule of law.

Respondent instead disputes Petitioners' reading of *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013), arguing that that decision did not expressly hold that Justice Kennedy's opinion in *Eastern Enterprises* was controlling. Opp. 15-16. But

even if Respondent were right about *Koontz*, four additional cases from this Court that Respondent ignores entirely (Pet. 16) would still mandate applying the *Eastern Enterprises* due process analysis. In any event, Respondent is wrong. *Koontz* held that Justice Kennedy's opinion was *distinguishable*, a conclusion it only needed to reach because it found that Justice Kennedy's opinion was controlling. Pet. 15; *see Santiago-Ramos v. Autoridad de Energia Electrica de P.R.*, 2015 WL 846750, at *3 n.9 (D.P.R. Feb. 26, 2015) (*Koontz* "suggests that Justice Kennedy's opinion is controlling" as to which constitutional provision applies).

But whichever side is right on the merits about *Eastern Enterprises*, Respondent effectively concedes that the Seventh Circuit widened entrenched Circuit splits. Pet. 17-20. The Third, Eleventh, and Federal Circuits would have applied an *Eastern Enterprises*-based due process analysis in this case, while the First, Fifth, and Tenth Circuits have held that *Eastern Enterprises* has precedential effect at least with respect to Takings claims, but have not yet considered due process. Pet. 17-19. By contrast, the Second, Fourth, Sixth, and D.C. Circuits, now joined by the Seventh Circuit, hold that *Eastern Enterprises* has no precedential effect whatsoever. Pet. 19-20. Respondent does not dispute that this is a longstanding and genuine split that can only be resolved through the intervention of this Court. Nor does Respondent dispute that the Seventh Circuit's opinion deepened a second entrenched split regarding whether a dissenting opinion can be counted for purposes of the *Marks* analysis. Pet. 20. *Marks v. United States*, 430 U.S. 188 (1977).

Respondent instead takes aim at a strawman, contending that there is no circuit split about the

constitutionality of Wisconsin's specific risk contribution rule. Opp. 13. Of course not, but there is a circuit conflict warranting review all the same. The *Eastern Enterprises* split means that there is an entrenched conflict on the constitutional standard to apply in evaluating laws like Wisconsin's. This Court would hardly hear any cases at all if it granted certiorari only when multiple circuits (or a State Supreme Court and the relevant circuit) disagreed about the constitutionality of the *same* state law.

Respondent alternatively contends that the *Eastern Enterprises* split is "academic" and "irrelevant" because the Seventh Circuit conducted a due process analysis. Opp. 13-14. This argument is baffling. It is true that the Seventh Circuit applied the Due Process Clause's rational basis test. App. 37a. But the question in this case is whether a heightened due process test applies because Wisconsin's risk contribution rule imposes severe, retroactive, and disproportionate liability. The Seventh Circuit recognized as much, spending 15 pages discussing whether a heightened *Eastern Enterprises* standard applied. The court ultimately concluded that rational basis review applied *because*, in the court's view, there was no "controlling test from *Eastern Enterprises*." App. 37a. Obviously, the Seventh Circuit did not think that the standard it applied was the same standard that would apply if Petitioners are correct and *Eastern Enterprises* is controlling.

The district court in this case applied *Eastern Enterprises* and properly concluded that Wisconsin's rule is unconstitutional under the *Eastern Enterprises* framework. The district court concluded that imposing liability here would be "severe," retroactive, and "completely unrelated and disproportionate to

[Petitioners'] experience." App. 79a-81a. The Seventh Circuit tellingly did not reach any alternative holding disputing these conclusions or suggesting that the risk contribution rule could survive *Eastern Enterprises*.

Indeed, as Petitioners pointed out and Respondent does not dispute, the retroactive effect here is unprecedented and well beyond the scope of the retroactive law the Supreme Court rejected in *Eastern Enterprises*. Pet. 20-22. Wisconsin's rule imposes liability for events that occurred 95 years ago or more, and 86 years before *Thomas* extended risk contribution to white lead carbonate pigment manufacturers. Pet. 22; *see Thomas v. Mallett*, 701 N.W.2d 523 (Wis. 2005). Even if the relevant date were Wisconsin's first (and much more limited) formulation of risk contribution in *Collins* in 1984, Wisconsin would still be reaching back as many as 65 years to impose liability based on conduct occurring in 1919 and earlier. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37 (Wis. 1984). Respondent largely ignores Petitioners' detailed demonstration that Wisconsin's rule would be unconstitutional under any opinion in *Eastern Enterprises*, and that this case therefore presents a good vehicle to resolve the split. Pet. 20-26. Notably, Respondent does not dispute that the Seventh Circuit was entirely wrong to assert that the risk contribution rule would reflect a manufacturer's "overall" liability. Pet. 23-25.

Rather than defending the Seventh Circuit's reasoning, Respondent makes the curious argument that *Eastern Enterprises* is inapplicable because the risk contribution rule "'does not impose liability, ... but merely modifies the manner in which a plaintiff may prove his case.'" Opp. 17 (quoting *Burton v. Am. Cyanamid Co.*, 775 F. Supp. 2d 1093, 1098 (E.D. Wis. 2011). The risk contribution rule makes Petitioners

liable to an entire class of plaintiffs to whom they would otherwise owe nothing: plaintiffs who are injured by products Petitioners did not make. Words have no meaning if the risk contribution rule "does not impose liability." Risk contribution does exactly what the Coal Act in *Eastern Enterprises* did: it retroactively requires Petitioners to pay money to a group of third parties.

Respondent contends that the "Seventh Circuit is in harmony" with the district court's determination in *Burton* that *Eastern Enterprises* is distinguishable even if controlling because it did not "impose liability." Opp. 18-19 (quoting *Burton*, 775 F. Supp. 2d at 1099). Nothing could be farther from the truth. The Seventh Circuit not only never cited *Burton*, it expressly rejected the view that *Burton* accepted and Respondent now advances. The court of appeals repeatedly described the risk contribution rule as a "theory of tort liability fashioned by the Wisconsin Supreme Court in *Thomas*." App. 2a; *see also, e.g.*, App. 4a (same); App. 5a (referring to "*Thomas*'s liability framework"); App. 14a (question is "the constitutionality of the liability framework created by *Thomas*"). Respondent takes out of context (Opp. 18) the Seventh Circuit's discussion of the limited causation-related defenses *Thomas* preserves. The Seventh Circuit was addressing the separate question whether risk contribution is irrational under the ordinary rational-basis test, App. 42a, not denying that the rule imposes a new liability.

Respondent is equally wrong to contend that *Eastern Enterprises* is inapplicable because it involved a statute, not a judicial decision announcing a new form of tort recovery. Once again, that was not the basis for the decision below. The Seventh Circuit held that *Eastern Enterprises* had no precedential value in

any case, because Justice Kennedy's opinion could not be combined with the dissent. App. 34a. That the Wisconsin rule was established by judges rather than legislators did figure in the Seventh Circuit's analysis, but only after it had rejected *Eastern Enterprises* and concluded that ordinary rational basis review applied. App. 38a-40a (discussing *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001)).

Nor do the cases Respondent cites regarding retroactive judicial lawmaking suggest that *Eastern Enterprises* would not apply here. In *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (cited at Opp. 1), the Court held that its own interpretation of federal law applied retroactively and required states to grant tax *refunds*. Obviously, *Harper* has no bearing on the opposite situation, where a state wants to apply a law retroactively to require private companies to *spend* money. And *Rogers v. Tennessee* (cited at Opp. 23-24) concerned a "routine exercise of common law decisionmaking," namely, eliminating the year-and-a-day rule in murder cases. 532 U.S. at 467. The Wisconsin risk contribution rule is not some incremental change in the common law, but creates an entirely new mode of liability. It is barred just the same as a judicial decision "attaching criminal penalties to what previously had been innocent conduct." *Id.* at 459.

Worse yet, and as the district court found, the risk contribution rule "highlights Justice Kennedy's warning about the temptation to use retroactive liability 'as a means of retribution against unpopular groups or individuals.'" App. 81a (quoting *Eastern Enterprises*, at 548). While a court's "opportunity for discrimination" may ordinarily be "more limited than [a] legislature's," *id.* at 451, that is not so here.

II. The Seventh Circuit Flouted This Court's Precedent By Eliminating Any Meaningful Causation Requirement

The Due Process Clause incorporates a causation requirement, Pet. 26-32, yet under the risk contribution rule, Petitioners will be forced to compensate plaintiffs for injuries they did not cause and for conduct of which they are "innocent." App. 44a-45a. Respondent does not dispute that the risk contribution rule imposes liability "for harm caused strangers to the litigation," *Philip Morris USA v. Williams*, 549 U.S. 346, 357 (2007), and for a pigment manufacturer's "nationwide policies rather than for the conduct directed toward the [plaintiffs]," *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408, 420 (2003). That is because, under the risk contribution rule, defendants need not have caused plaintiffs any harm at all, nor directed any conduct toward the plaintiffs. Plaintiffs may sue solely on the ground that defendants manufactured white lead carbonate pigments somewhere in the United States at some point. Pet. 2, 9.

Respondent contends that the risk contribution rule's elimination of any meaningful causation requirement is permissible because risk contribution imposes compensatory damages, while *Philip Morris* and *State Farm* concerned punitive damages. Opp. 22-23. But Respondent never explains why it would be permissible to eliminate a causation requirement for compensatory damages if it is impermissible for punitive damages. As Respondent acknowledges (at 22) compensatory damages aim at redressing specific damages to a specific plaintiff, while punitive damages "serve a broader function." Proof that the defendant's act caused the plaintiff's harm therefore should be

more necessary, not less, for purposes of compensatory damages. And as the district court and Judge Sykes have recognized, by dispensing with an individualized causation requirement in case after case, the risk contribution rule effectively imposes damages on the same theory that underlies punitive damages. Pet. 28-29. Juries "assess and fix relative blame across an entire industry, not for the harm sustained by the plaintiff who will recover but for generalized harm to the public at large." *Id.* (quoting the Hon. Diane S. Sykes, *Reflections on the Wisconsin Supreme Court*, 89 Marq. L. Rev. 723, 730 (2006)).

Respondent asserts that the Seventh Circuit "already performed the Due Process analysis set forth in *Philip Morris* and *State Farm*." Opp. 23. That is untrue. The *district court* performed that analysis, and concluded that the risk contribution rule was independently precluded by *Philip Morris* and *State Farm*, regardless of whether *Eastern Enterprises* applied. App. 85a-87a. The Seventh Circuit, by contrast, reasoned that the risk contribution rule was constitutionally sufficient with respect to causation because plaintiffs must prove that the defendant produced lead pigments, and that plaintiffs were injured by lead pigments. Pet. 30. Respondent does not even try to explain how those showings—which on their face do not establish that the defendant caused the plaintiff's injury—suffice under the "Due Process analysis set forth in *Philip Morris* and *State Farm*." Opp. 23.

Respondent ignores entirely other decisions from this Court holding that the Due Process Clause imposes a causation requirement that applies in the compensatory damages context and that would render the risk contribution rule unconstitutional. Pet. 26-32

(citing cases); *see* Br. of Chamber of Commerce et al. at 4-9, 11-14. The Seventh Circuit's causation analysis directly conflicts with *State Farm*, *Philip Morris*, and other binding decisions of this Court and calls out for correction.

III. The Questions Presented Are of Critical and Recurring Importance to U.S. Businesses

Respondents contend (at 2) that this case does not warrant this Court's review because the Seventh Circuit's opinion "addressed a narrow issue: whether [Wisconsin's risk contribution rule] violated the Due Process and Takings clauses." That is plainly not so. The Seventh Circuit's conclusion that *Eastern Enterprises* supplies no controlling rule of law now governs every case in the Seventh Circuit involving the imposition of retroactive economic liability. What standard applies in such cases is a hugely important national issue, as the nearly 500 cases addressing *Eastern Enterprises* since 1998 reflect. Pet. 35.

The lower court's holding on causation likewise has far-reaching implications. A group of private sector *amici*—representing manufacturers in every industrial sector, pharmaceutical developers and researchers, the agricultural business, and the Chamber of Commerce—has explained that the risk contribution rule reflects a broader trend across many areas of tort law imposing collective liability and relieving plaintiffs of the burden of showing causation. Br. of Chamber of Commerce et al. at 14-20. As *amici* explain, the Seventh Circuit's holding that the Due Process Clause permits states to adopt theories presuming whole classes of defendants to be liable could result in billions of dollars in liability.

Finally, the constitutionality of Wisconsin's risk contribution rule is itself vitally important. Petitioners face hundreds of millions of dollars in potential liability in the pending cases alone. Pet. 32-33. Respondent downplays the rule as concerning a "single state," Opp. 2, but in fact Wisconsin's rule imposes enormous retroactive liability on *out-of-state* pigment suppliers, including for their activities out of state. Pet. 31-33. Respondent's contention that review in this case would be "advisory" or "moot" (Opp. 2) reflects a misunderstanding of those terms. Although the Wisconsin legislature prospectively abrogated the risk contribution rule, Respondent is relying on that rule in these proceedings. A decision from this Court holding the rule unconstitutional would end this case. It would also end other pending risk contribution cases involving 172 additional plaintiffs (all represented by Respondent's counsel).

And that is not all. Respondent says that the repeal applies "to lead poisoning cases accruing after February 1, 2011." Opp. 2. Risk contribution claims accrue when plaintiffs are children who may take advantage of Wisconsin's minority tolling rule, which extends the statute of limitations for as many as 18 years. Pet. 33-34. Respondent does not dispute that, by opposing review, he seeks to clear the way for innumerable additional plaintiffs whose claims accrued before the repeal to file new risk contribution cases through 2029, notwithstanding the repeal. Pet. 33-34. This Court has granted certiorari to resolve circuit splits concerning repealed laws where the law has an "afterlife." *Judulang v. Holder*, 132 S. Ct. 476, 481, 483 (2011). The case for review here is even stronger because the Court's constitutional analysis would apply universally, long after risk contribution's afterlife is over.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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